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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 DARREN CORNELIUS STANLEY,

14 Petitioner,

15 vs.

16
17 RON DAVIS, Warden,
San Quentin State Prison,

18 Respondent.
19

No. 3-7-CV-4727-EMC

DEATH PENALTY CASE

**PETITIONER'S NOTICE OF MOTION
AND FOURTH MOTION FOR EQUITABLE
TOLLING**

Date: March 3, 2016

Time: 1:30 p.m.

Courtroom 5 - 17th Floor

20 PLEASE TAKE NOTICE THAT Petitioner will and hereby does move this Court for an
21 Order equitably tolling the time in which Petitioner must file his finalized petition for an additional
22 period of 90-days. This motion is based upon the understanding of the parties that there are
23 currently 127-days remaining on the one-year statute of limitations set forth in 28 U.S.C. section
24 2244(d)(1). Thus, Petitioner's request is for a total of 217-days from the date the stay is lifted in
25 which to file a timely finalized petition.
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On July 8, 2010, Stanley filed a 467-page *pro se* “protective petition” raising 59-claims for habeas corpus. (Docket # 5.) The Court appointed counsel for Stanley on February 11, (Docket # 11.) Counsel thereafter filed a second motion for equitable tolling based upon’s right to counsel and to have counsel file a “finalized petition” within the meaning of 54-28 of the *Rules for the Northern District of California*. (Docket # 17.) The Court that motion and ordered that “Petitioner should file his finalized petition on or before y 10, 2012. (Docket # 26.) In effect, the Court tolled the one-year statute of limitations e date of appointment of counsel.

Well prior (127-days, to be exact) to the deadline for filing the finalized petition, on November 10, 2011, Stanley filed Docket # 35; Ex Parte Motion To Stay Proceedings And For Equitable Tolling Pending Determination of Petitioner’s Competency. In that motion Stanley sought “equitable tolling of the federal habeas statute of limitations nunc pro tunc to October 6, 2011, when Petitioner submitted to the Court a budget request to prepare his finalized petition.” (Docket # 39, Order Resolving Pending Motions, dated November 28, 2011.) The Court granted that motion finding that Stanley was entitled to a stay pending a determination of his competency to assist counsel. The Court’s Order also stated: “The Court therefore grants such a stay, including equitable tolling, nunc pro tunc to October 6, 2011.” (Docket # 39.)

On July 16, 2013, the Court found that Stanley was permanently incompetent to assist counsel. (Docket # 106, p. 2.) At that time the Court lifted the previously imposed stay for two limited purposes: “first to determine whether Petitioner is incompetent to be executed; and second, to pursue settlement of the action so as to avoid the possibly pointless expenditure of scarce government resources.” (Docket # 106, p. 5.) In that same order the Court denied Stanley’s Third Motion for Equitable Tolling, Docket # 104, “without prejudice as premature.” (Docket # 106, p. 6.) The Court also noted,

1 Petitioner may be entitled to indefinite equitable tolling of the habeas statute of
2 limitations if he is unable to file a finalized petition due to his incompetency, which could
3 mitigate the cost substantially. See *Gonzales*, 133 S. Ct. at 704 n. 6. (Docket #106, p. 5
4 n.5.)

5
6 Prior to January 8, 2013, a finding that Stanley was incompetent and that restoration of
7 competency was unlikely would have caused the Court to continue the stay of the proceedings
8 indefinitely. See e.g. *Blair v. Martel*, 645 F.3rd 1151, 1154 (9th Cir. 2011). However, on January
9 8, 2013, the United States Supreme Court issued its opinion in *Ryan v. Gonzales*, 133 S.Ct. 696
10 (2013).

11 *Gonzales* overruled the Ninth Circuit's opinions in *Rohan v. Woodford*, 334 F.3rd 803 (9th
12 Cir. 2003) and *Nash v. Ryan*, 581 F.3rd 1048 (9th Cir. 2009) which had found a right to
13 competency in capital habeas proceedings based upon a petitioner's statutory right to counsel. The
14 *Gonzales* opinion concluded by stating the following:

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16 If a district court concludes that the petitioner's claims could substantially benefit
17 from the petitioner's assistance, the district court should take into consideration the
18 likelihood that the petitioner will regain competence in the foreseeable future. Where
19 there is no reasonable hope of competence, a stay is inappropriate and merely frustrates
20 the State's attempt to defend its presumptively valid judgment.

21 *Ryan v. Gonzales*, *supra*, 133 S.Ct. at 709.

22
23 In its Order Resolving Pending Motions, the Court found that Stanley "has raised claims
24 that could benefit from his ability to communicate rationally, such as claims that his trial counsel
25 rendered ineffective assistance." (Docket # 39, p. 2; listing claims in the protective petition by
26 claim number and page number; internal quotations and citations deleted.)

1 In an order dated February 2, 2015, the Court noted settlement proceedings had been
2 conducted but that “the parties have made clear that no progress has been made regarding a
3 potential settlement.” (Docket # 164, p. 3.) Therefore, the Court ordered the parties to conduct
4 further mental health examinations of Stanley “focused on the issue of whether Petitioner is
5 permanently incompetent to be executed.” (Id., at p. 9.)

6 In a case management order issued on December 18, 2015 (Docket # 184), the Court
7 indicated that it “intends to lift the stay so that a finalized petition may be filed and this matter may
8 proceed.” (Docket # 184.) A further case management conference is currently scheduled for
9 February 9, 2016. Petitioner is filing this Motion based on the assumption that, consistent with
10 Docket # 184, the Court intends to lift the stay on that date. If so, the 127-days remaining on the
11 statute of limitations will resume running.

12 Respondent has repeatedly argued that under *Gonzales* the stay imposed in order to
13 determine Stanley’s competency should be vacated, the one-year statute of limitations should
14 resume running, and counsel for Stanley should file a finalized petition within 127 days. (*See*
15 Respondent’s Position in Joint Statement, Docket # 185.) In other words, Respondent contends
16 that a finding that Stanley is permanently incompetent, and has been incompetent during the
17 entirety of counsels’ representation in federal court, is of no consequence to the filing of the
18 finalized petition, or its contents. According to Respondent, whether competent or not, once a
19 competency determination is made, the running of the statute of limitations must resume. Thus,
20 Respondent believes that Stanley’s incompetency is entirely meaningless to this proceeding.

21 Stanley takes a different view. As set forth below Stanley contends that a finding of
22 incompetence in this case fundamentally alters how and when counsel must prepare and file a
23 finalized petition, *if ever*. *Gonzales* addressed only the “outer limits” of what a district court could
24 do when faced with an incompetent petitioner who has already filed a finalized petition and the
25 claims at issue were “record based or resolvable as a matter of law” requiring no factual
26 development. Even then the court did not “presume that district courts need unsolicited advice
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1 from us on how to manage their dockets.” *Ryan v. Gonzales, supra*, 133 S.Ct. at 708.

2 The situation in Stanley’s case is completely different. He has been found permanently
3 incompetent before a finalized petition has been filed, and he has and will raise claims that require
4 further factual development, including claims that would benefit from facts potentially within his
5 private knowledge. No court has addressed how or when a petitioner is to file a finalized petition
6 under these circumstances.

7 Petitioner’s counsel ask for seven months (217-days) to explore their client’s case before
8 the statute of limitations for raising timely claims expires. Left unresolved and potentially mooted
9 by an Order granting the additional period of tolling: if there is no evidence in existence at this
10 point (24-years after trial) to discern why trial counsel chose or neglected to raise a competency
11 issue or insanity defense at trial, does the situation amount to a suspension of the writ of habeas
12 corpus in violation of Art I, § 9, clause 2 of the Constitution? Essentially, that would mean
13 Petitioner would not have any meaningful opportunity to challenge the *substance* of his trial
14 conviction on habeas at all. That scenario would go further than *Ryan v. Gonzales*, which merely
15 delineated the scope of petitioner’s statutory *process* right to stay the litigation of a petition on file
16 during a period of incompetency. An Order for 90-days equitable tolling may moot that issue by
17 permitting counsel to develop alternate sources of information on non-record claims.

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19 B. Incompetency and Equitable Tolling After *Gonzales*

20 Both petitioners whose cases were at issue in *Gonzales* had long since filed their finalized
21 petitions before a finding of incompetency was entered in the proceedings. “In *Gonzales*’ case, the
22 District Court correctly found that all of *Gonzales*’ properly exhausted claims were record based or
23 resolvable as a matter of law, irrespective of *Gonzales*’ competence.” *Ryan v. Gonzales, supra*,
24 133 S.Ct. at 708. Concerning the second petitioner, Carter, the Supreme Court in *Gonzales* noted
25 that “the District Court concluded that four of Carter’s claims could potentially benefit from
26 Carter’s assistance.” While three of these claims were probably also “record based,” the fourth

1 claim may have been unexhausted and not procedurally defaulted. In any event, however, the
2 Court concluded that in such a case “an indefinite stay would be inappropriate.” *Id.*, at 709.

3 Unlike the petitioners in *Gonzales*, Stanley has not filed a finalized petition. The issue of
4 Stanley’s competency arose *before* the statute of limitations to file his petition had run. And,
5 unlike the petitioners in *Gonzales*, it cannot be said that Stanley has raised or will raise only claims
6 that are purely record based. Indeed, Stanley’s finalized petition will raise numerous claims that
7 are not record based.

8 Counsel for Stanley must therefore prepare and file a finalized petition even though
9 Stanley has been and will remain incompetent during the entirety of counsel’s representation. Put
10 another way, counsel must prepare and file a finalized petition in which counsel will raise, and the
11 protective petition has already raised, “claims that could benefit from (Stanley’s) ability to
12 communicate rationally” with counsel. (Docket # 39, p. 2.) Yet, as a result of Stanley’s
13 incompetency, counsel for Stanley have been and will continue to be without the benefit of
14 Stanley’s knowledge of the facts of the offenses themselves and Stanley’s prosecution in state
15 court, including his communications and relationship with trial counsel, and counsel’s stated
16 reasons for his conduct of the trial defense and investigation. This permanent inability to access
17 facts normally provided by the petitioner himself will severely impact counsels’ ability to prepare
18 and file a finalized petition in this case.

19 This Court acknowledged, but did not resolve, this dilemma in 2013. In its Order finding
20 Stanley incompetent, the Court noted, “If his (Stanley’s) claims would substantially benefit from
21 his assist, logic would suggest a stay is warranted so long as the petitioner remains incompetent.”
22 (Docket # 106, p. 3.) The Court then stated, “Accordingly, regardless of whether the Court may
23 permanently stay all further proceedings under the facts of this case where that Petitioner is
24 permanently incompetent and his assistance is important to the claims asserted (unlike in
25 *Gonzales*), the Court maintains the discretion to manage the action so as to resolve it as
26 expeditiously as possible.” (*Id.*, at p. 4.)

1 Compounding Stanley's situation is the fact that lead trial counsel, Walter Cannady, died
2 on August 7, 2013. Thus, habeas counsel face a permanent inability to access facts normally
3 obtained from trial counsel. The interplay between Stanley's incompetency and the death of trial
4 counsel will be discussed more fully below.

5 "Habeas corpus petitions must meet heightened pleading requirements..." *McFarland v.*
6 *Scott*, 512, U.S. 849, 856 (1994). A petitioner's claims may be subject to procedural bar if not
7 presented in the first finalized petition. *McClesky v. Zant*, 499 U.S. 467, 498 (1991): "petitioner
8 must conduct a reasonable and diligent investigation aimed at including all relevant claims and
9 grounds for relief in the first federal habeas petition...Omission of the claim will not be excused
10 merely because evidence discovered later might also have supported or strengthened the claim."
11 Because of these "heightened pleading requirements," the Supreme Court has noted that the
12 "services of investigators and other experts may be critical in the pre-application phase of a habeas
13 proceeding, when possible claims and their factual bases are researched and identified."
14 *McFarland v. Scott, supra*, 512 U.S. at 855.

15 An incompetent petitioner who cannot rationally communicate with habeas counsel, like
16 Stanley, obviously cannot communicate to habeas counsel factual information which, if
17 investigated, might lead to claims, or facts in support of claims, that should, under *McClesky*, be
18 raised in the finalized petition. As a result, absent equitable relief here, those claims may, and
19 probably will, be procedurally barred from consideration by any court.

20 Additionally, Local Rule 2254-28(b)(3) requires that a finalized petition filed in this
21 district "[s]et forth each factual allegation or group of related allegations in a separately numbered
22 or lettered paragraph." "Conclusory allegations which are not supported by a statement of specific
23 facts do not warrant habeas relief." *James v. Borg*, 24 F.3rd 20, 26 (9th Cir. 1994).

24 Since this Court has already found that a number of claims raised by Stanley would benefit
25 from Stanley's ability to rationally communicate with counsel, and Stanley cannot rationally
26 communicate with counsel, counsel needs to find alternate sources of information to "set forth
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1 each factual allegation” or allege “specific facts” in the finalized petition. To be clear, Stanley
2 does not suggest that finding “alternate sources of information” includes formal discovery
3 procedures such as depositions. Instead, information that habeas counsel would normally obtain
4 from the petitioner may, in some instances, be obtained from others. However, in Stanley’s case
5 finding other sources of information is further complicated by the fact that lead trial counsel has
6 died.

7 *Gonzales* did not address *how*, if ever, counsel for an incompetent petitioner is to properly
8 file a finalized petition. However, it did expressly recognize that the incompetency of a petitioner
9 might require equitable tolling. The Court noted that the debate over whether a statutory right to
10 counsel might include a right to competency has “nothing to do with AEDPA’s statute of
11 limitations.” *Ryan v. Gonzales, supra*, 133 S. Ct. at 704, n. 6. “The relevant questions for
12 equitable tolling purposes are whether the petitioner has been pursuing his rights diligently and
13 whether some extraordinary circumstance stood in his way.” *Id.*, quoting *Holland v. Florida*, 130
14 S.Ct. 2549, 2562 (2010) and *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). The *Gonzales* court
15 then cited with approval the Ninth Circuit’s opinion in *Bills v. Clark*, 628 F. 3rd 1092, 1097 (9th
16 Cir. 2010) for the rule that even non-capital habeas petitioners “who do *not* have a statutory right
17 to counsel...may still avail themselves of equitable tolling if they are mentally incompetent.” *Ryan*
18 *v. Gonzales, supra*, 133 S.Ct. at 704, fn. 6; emphasis in original.

19 The Ninth Circuit’s opinion in *Bills* was just one of several that “recognized equitable
20 tolling in the context of a petitioner’s mental illness.” *Bills v. Clark, supra*, 628 F.3rd at 1097.
21 In *Calderon v. District Court (Kelly)*, 163 F. 3rd 530, 541 (9th Cir. 1998), the Ninth Circuit
22 recognized that a habeas petitioner’s mental incompetency is “a condition that is, obviously, an
23 extraordinary circumstance beyond the prisoner’s control.” As a result, “mental incompetency
24 justifies equitable tolling.” *Id.*

25 In *Laws v. Lamarque*, 351 F.3rd 919, 923 (9th Cir. 2003), the Ninth Circuit quoted *Kelly*
26 when it stated: “We have already stated that a ‘putative habeas petitioner’s mental incompetency
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1 [is] a condition that is, obviously, an extraordinary circumstance beyond the prisoner's control,' so
2 'mental incompetency justifies equitable tolling' of the AEDPA."

3 None of these opinions granting equitable tolling, however, addressed the precise situation
4 at issue here. In *Kelly*, *Laws*, and *Bills* a federal petition had already been filed. In each case the
5 respondent argued that the petition was filed beyond the one-year statute of limitations. In each
6 case the Ninth Circuit found that, assuming the petition was filed beyond the one-year period,
7 additional time should be tolled if the petitioner was incompetent. In both *Laws* and *Bills*, the
8 Ninth Circuit remanded the case to the district court "for further factual development" and to
9 determine how much time "should be equitably tolled by virtue of Laws's mental incompetence."
10 *Laws v. Lamarque*, *supra*, 351 F.3d at 924-925.

11 Here, in contrast, Stanley has been found incompetent *before* he has filed his finalized
12 petition. This Court has already determined that there is no reasonable possibility that Stanley's
13 competency will be restored. (Docket # 106, p. 2.) Yet, he must prepare and file a finalize
14 petition without access to facts as a result of his incompetency, an extraordinary circumstance
15 beyond his control. No reported case, including *Gonzales*, suggests how Stanley's undersigned
16 counsel, or the Court, should proceed in this situation.

17 As this Court has already suggested, it may be impossible for Stanley to file a finalized
18 petition. This Court stated: "It must be emphasized that the present action is still in its most
19 preliminary stage, as Petitioner has not even filed a finalized petition yet...However, Petitioner
20 may be entitled to indefinite equitable tolling of the habeas statute of limitations if he is unable to
21 file a finalized petition due to his incompetency, which could mitigate the cost substantially."
22 (Docket # 106, p. 5, fn. 5.)¹

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24 ¹ The Court restated this observation as recently as February 2, 2015. Then the Court
25 stated that "(Petitioner) has not yet been ordered to file a finalized petition, and per an earlier
26 Order, this Court noted that Petitioner might be entitled to indefinite equitable tolling of the habeas
27 statute of limitations, if his permanent incompetency rendered him unable to file a finalized
28 petition." (Docket # 164, p. 3, fn. 1.)

1 At this time, Stanley does not contend that he is unable to file a finalized petition due to
2 his incompetency. At this time it is premature to reach such a conclusion.

3 Instead, Stanley contends that he must be granted additional equitable tolling totaling 90
4 days so he may attempt to prepare and file a complete finalized petition. As set forth below, this
5 additional equitable tolling is necessary so that Stanley may complete preservation discovery
6 already granted by the Court and so Stanley may conduct additional fact development that is made
7 necessary by Stanley's incompetency and the death of lead trial counsel.

8
9 1. Preservation Discovery

10 _____ On May 10, 2013, this Court granted Stanley's motion for discovery regarding his claims
11 that the prosecutor withheld exculpatory evidence at trial. (Docket # 97.) The Court concluded,
12 "Good cause appearing therefore, the Court grant's Petitioner's Motion for *Brady/Napue*
13 Preservation Discovery." The Court ordered that there was good cause for Stanley to schedule and
14 take the depositions of the trial prosecutor Theodore Landswick, former Alameda district attorney
15 inspector Robert Gannon, former Oakland police officers Ignatius Chin and Michael Sitterud, and
16 former Alameda County criminalist Alan Keel.

17 Stanley's preservation discovery motion was granted while the stay to determine Stanley's
18 competency was still in place. If the stay is vacated and the running of the statute of limitations
19 resumed, Stanley would have only 127 days to conduct and complete all of the preservation
20 discovery ordered by the Court *and* to prepare and file the finalized petition. The finalized petition
21 would have to include the facts developed during the preservation discovery. Under the
22 circumstances, it will not be possible to prepare and file the finalized petition in that time period.
23 The equitable tolling requested by Stanley will permit him to complete the preservation discovery
24 previously ordered by the Court - to the extent that counsel determine it is efficacious to do so at
25 this time - and to incorporate the facts developed into the finalized petition.

1 2. Necessary Fact Development

2 _____ As discussed above, this Court has already determined that the protective petition alleged
3 ineffective assistance of counsel claims which could benefit from rational communication with
4 counsel. Such rational communication is not possible now or ever due to Stanley's incompetence.
5 Stanley's permanent incompetency precludes him from sharing any "private knowledge" of the
6 underlying facts of the offenses or his trial proceedings. Counsel have not been able to have a
7 rational conversation with Stanley about the offenses of conviction. Counsel have not been able to
8 have a rational conversation with Stanley about the defense or defenses investigated, prepared, and
9 presented by trial counsel. Counsel have not been able to have a rational conversation with Stanley
10 about his relationship and communications with trial counsel. Counsel have not been able to have
11 a rational conversation with Stanley about his communications with any of the investigators,
12 psychiatrists, psychologists, or other experts retained by trial counsel. Counsel have not been able
13 to have a rational conversation with Stanley about mitigating evidence which was presented at trial
14 and mitigating evidence which was not presented at trial, including life history witnesses to his
15 childhood development. Counsel have not been able to have a rational conversation with Stanley
16 about claims made, or not made, in the state post-convictions proceedings. In short, counsel have
17 not been able to have a rational conversation with Stanley about any aspect of his case or his
18 representation in state court.

19 Stanley seeks equitable tolling so he may conduct the essential factual development
20 necessary to fill in the factual gaps created by his incompetence and the death of lead trial counsel.
21 Counsel for Stanley must develop facts in support of numerous ineffective assistance of counsel
22 claims that depend on facts which ordinarily would be provided by a competent petitioner. These
23 factual allegations are necessary in order for Stanley to allege ineffective assistance of counsel
24 claims in the finalized petition. If Stanley is not permitted to complete this factual development, it
25 is likely the finalized petition would omit claims that should be included and include claims that do
26 not contain all the necessary factual allegations. Put another way, the finalized petition would be
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1 incomplete as a direct result of Stanley's incompetency.

2 As discussed above, the Court noted that the protective petition (Docket # 5) filed by
3 Stanley in 2010 "raised claims that could benefit from his ability to communicate rationally...such
4 as claims that his trial counsel rendered ineffective assistance." (Docket # 39, p. 2; internal
5 quotations deleted.) The Court specifically listed Claims 7, 25, 34-38, 40-44, 48-53, and 58 in the
6 protective petition as claims which "could benefit from his (Stanley's) ability to communicate
7 rationally" with counsel. Claim 7, for instance, alleged numerous instances of counsel's
8 ineffective assistance at the guilt phase of trial.

9 No mental state evidence was presented at the guilt phase of Stanley's trial. Claim 42 of
10 the protective petition alleged that trial counsel "failed to conduct an adequate and complete
11 investigation into petitioner's family history, thus failing to obtain and make known to the
12 psychiatric experts and jurors critical information bearing on petitioner's mental illness." (Docket
13 # 5, p. 395.) Had trial counsel conducted a complete investigation, according to the protective
14 petition, they would have obtained evidence that at the time of the offenses Stanley "probably
15 suffered from dementia, had no ability to exercise executive functioning, could not learn from his
16 mistakes, and became more delusional as he grew older." (Docket # 5, p. 399.)

17 Similarly, Claim 58 of the protective petition alleged that trial counsel was ineffective for
18 failing to investigate and raise a defense of insanity. (Docket # 5, pp. 465-467.) Had trial
19 counsel done so, the protective petition alleged, "at the time of his crimes in 1988 and 1989
20 (Stanley) was delusional and in a full-blown manic state...his psychiatric condition was such that
21 he was not capable of distinguishing between moral right and wrong." (Docket # 5, p. 465.)

22 Other issues appear in the record of Stanley's trial that may form the factual basis for
23 claims not alleged in the protective petition. For instance, on June 7, 1991, at the end of the guilt
24 phase of trial, a bailiff informed the court that "in a fit of anger" Stanley struck a wall with his
25 hand. The bailiff informed the court that "a bone might be sticking out of his hand." (RT 4633.)
26 No further mention is made in the trial record of this incident. At the next court appearance, on
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1 June 11, 1991, while Stanley was not in the courtroom, the trial judge announced on the record that
2 the bailiff had informed him that Stanley planned on attacking one of his attorneys in the
3 courtroom that afternoon. (RT 4635.) Nothing further is said on the record about this alleged
4 “planned ‘attack.’” Counsel have never had a rational conversation with Stanley about these
5 incidents and whether they affected his trial.

6 Perhaps most importantly, based on information, facts, and evidence developed during the
7 proceedings to determine Stanley’s competency, Stanley intends to raise in his finalized petition a
8 number of claims not raised in the protective petition. For example, this Court found that Stanley
9 “suffers from one or more severe and chronic psychiatric disorders including dementia, due at least
10 in part to organic brain dysfunction caused by frontal-lobe encephalomalacia...” (Docket # 106, p.
11 2.) Stanley will set forth claims in the finalized petition that allege this “organic brain dysfunction”
12 existed long before, and certainly at the time of the offenses and at the time of his trial. Based on
13 these facts, Stanley will plead claims in his finalized petition that he lacked the mental state
14 necessary for conviction of a capital offense, that he was incompetent to stand trial, and that he was
15 incompetent to assist state habeas counsel, among others. Each of these claims will take three
16 forms. For instance, the finalized petition will set forth a claim that Stanley was incompetent to
17 stand trial, that trial counsel was ineffective for failing to investigate and present evidence of
18 Stanley’s incompetence to stand trial, and that state appellate/habeas counsel was ineffective for
19 failing to raise Stanley’s incompetence to stand trial in state post-conviction proceedings. (See
20 *Martinez v. Ryan*, 132 S.Ct. 1309, 1315 (2012).)

21 As to *all* of these claims - those alleged in the protective petition, those based upon the
22 trial record but not alleged in the protective petition, and those based on information developed
23 during Stanley’s competency proceedings - facts normally obtained from a competent petitioner
24 and trial counsel are not available. For instance, why trial counsel decided not to present any
25 mental state defense at trial is not presently known. Why trial counsel failed to conduct a complete
26 investigation into Stanley’s mental illness is not presently known. What information trial counsel
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1 obtained or could have obtained from Stanley concerning his family history and onset of mental
2 illness is not presently known. What Stanley was told, or not told, about the evidence or defense
3 that trial counsel intended to present at trial is not presently know.

4 The factual gap created by Stanley's incompetency and the death of lead trial counsel
5 cannot be filled by Richard Hove, co-counsel at trial. The deposition of Hove was taken by the
6 parties in 2012. Hove did not appear as counsel of record for Stanley until February 1, 1991.
7 Stanley's trial started with the voir dire of potential jurors on February 26, 1991. When asked what
8 defense was to be presented at trial, Hove testified that "we did go on a – essentially an ID matter
9 issue, 'I didn't do it' defense because that's what Darren (Stanley), I believe, wanted to do. (Hove
10 deposition, pp 17-18.) When asked if he recalled statements Stanley made to defense investigators,
11 Hove testified, "No, I don't, cause I didn't do any investigation on the case." (Hove deposition, p.
12 97.) Hove, added, "I never investigated anything." (Hove deposition, p. 98.) Hove similarly
13 testified that he could not recall "him (Stanley) talking to me directly about the crime." (Hove
14 deposition, p. 198.) When asked specifically about the penalty phase, Hove testified, "Once again
15 I can't say - have to say I don't remember doing any investigation." (Hove deposition, p. 120.)
16 Concerning mitigating evidence in the form of "background information" on Stanley, Hove
17 testified, "there were a lot of things with Darren (Stanley) that we had difficulty with because as I
18 think I used the term, Lincoln Mintz called Darren an asshole. Darren had been an asshole all his
19 life..." (Hove deposition, p. 122.)

20 Why trial counsel decided to present a defense based upon the assertion that Stanley
21 "didn't do it" is not presently known. Hove suggested only a 19-year post-trial "belief" that
22 Stanley "wanted to do" such a defense. But Hove admitted that he conducted no investigation and
23 he could not recall ever talking to Stanley "about the crime."

24 An ineffective assistance of counsel claim in large part turns on the nature and extent of
25 trial counsel's investigation. "Counsel can hardly be said to have made a strategic choice when
26 s/he has not yet obtained the facts on which such a decision could be made...however (counsel)
27 failed to conduct a reasonable investigation, nor did he make a reasonable decision rendering
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1 investigation unnecessary.” *Bemore v. Chappell*, 788 F.3rd 1151, 1165 (9th Cir. 2015); internal
 2 quotations deleted. *Strickland v. Washington*, 466 U.S. 668, 691 (1984) expressly noted the
 3 importance of trial “counsel’s conversations with the defendant” in determining the
 4 reasonableness of trial counsel’s investigation. “In short, inquiry into counsel’s conversations with
 5 the defendant may be critical to a proper assessment of counsel’s investigation decisions, just as it
 6 may be critical to a proper assessment of counsel’s other litigation decisions.” *Id.*

7 Stanley is incompetent. Lead trial counsel is dead. Co-counsel at trial “didn’t do any
 8 investigation on the case.” These are exactly the kind of “extraordinary circumstances” which
 9 make equitable tolling appropriate. In order to properly plead ineffective assistance of counsel
 10 claims in the finalized petition, counsel for Stanley must obtain facts from alternate sources. These
 11 alternate sources could potentially include Stanley’s friends and family members, if any, who
 12 discussed the trial proceedings with trial counsel. These sources could also include other members
 13 of the defense team at trial, such as investigators, jury consultants, paralegals, and other experts.
 14 All such sources must be interviewed. To date, they have not. Stanley’s counsel cannot say at this
 15 time whether, in fact, he will be able to fill the factual gap which presently exists.

16 17 C. Conclusion

18 _____No court has yet addressed how to proceed after finding a petitioner incompetent prior to
 19 the filing of a finalized petition. However, “habeas corpus is, at its core, an equitable remedy.”
 20 *Schlup v. Delo*, 513 U.S. 298, 319 (1995). The demands of equity require that Stanley not be
 21 penalized because of his incompetency. Therefore Stanley requests that the Court grant him an
 22 additional 90-days of equitable tolling in this case.

23 DATED: January 25, 2016

Respectfully submitted,
 ROGER I. TEICH
 DAVID A. NICKERSON
 Attorneys for Petitioner
 DARREN CORNELIUS STANLEY

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 27 By /s/
 DAVID A. NICKERSON